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No. A-860

In the Supreme Court of the United States

CATHERINE BARBER AND AS EXECUTRIX,
PETITIONER,

v.

SOMERVILLE HOSPITAL, INC., AND ASSIGNS;
DR. ALBERT H. FINE
INTERNAL MEDICINE SERVICES, INC.,
AND ASSIGNS;
VISITING NURSE, INC., AND ASSIGNS,
RESPONDENTS.

BRIEF OF RESPONDENTS, SOMERVILLE HOSPITAL AND ALBERT H. FINE, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the dismissal of Petitioner's case pursuant to Massachusetts General Law Chapter 231, §60B presents an appropriate instance for issuance of a Writ of Certiorari.

2. Whether a Medical Malpractice Tribunal convened pursuant Massachusetts General Laws Chapter 231, §60B, properly determined that Plaintiff's offer of proof was insufficient to raise a legitimate question of liability appropriate for judicial inquiry.

3. Whether judgment properly entered dismissing the claim against Somerville Hospital and Albert H. Fine, M.D. on the basis of the Medical Malpractice Tribunal's finding and Plaintiff's failure to post the requisite bond.

4. Whether all other issues raised by Petitioner in her Petition for Writ of Certiorari fail to raise questions appropriate for appellate review.

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STATUTES INVOLVED

Massachusetts General Law Chapter 231, Section 60B; and Massachusetts General Law Chapter 231, Section 60C are reproduced in Appendix A to this brief.

STATEMENT OF THE CASE

On August 4, 1985, Ms. Catherine Barber commenced this action of medical malpractice in the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, alleging, *inter alia*, that the Defendants "failed to perform their duties in general and provide the standard of care expected when a patient is taken to a hospital"; that the Hospi-

* Somerville Hospital, Inc., Respondent, has no parent or subsidiary company to be listed pursuant to Rule 29.1 of the Rules of the Supreme Court.

tal was "negligent or failed to use due care in establishing emergency room procedures"; that the Defendants "abandoned" their patient; and that all Defendants "failed to adequately and properly treat the Plaintiff's decedent according to their respective professional standards."

Pursuant to M.G.L.c. 231, §60B, the Defendants made demand for the convening of a Medical Malpractice Tribunal, which was convened on January 12, 1990. Upon review of Plaintiff's offer of proof, and arguments of counsel and Ms. Barber, the Tribunal found as to all Defendants "[t]hat the evidence, if properly substantiated, is not sufficient to raise a legitimate question of liability appropriate for judicial inquiry and the Plaintiff's action is merely an unfortunate medical result." Plaintiff was ordered to post a bond, secured by cash or its equivalent, as a pre-condition to pursuit of the claim.

When the Plaintiff failed to post the requisite bonds, Defendants moved for dismissal, and the action was thereafter dismissed on April 30, 1990.

On appeal to the Appeals Court for the Commonwealth of Massachusetts, the judgments were affirmed. Plaintiff's Application for Further Appellate Review was thereafter denied by Supreme Judicial Court for the Commonwealth of Massachusetts on February 26, 1992.

SUMMARY OF THE ARGUMENT

This is an action of medical malpractice that was dismissed pursuant to M.G.L.c. 231, §60B following a Medical Malpractice Tribunal's finding that Plaintiff's action was merely an unfortunate medical result. Pursuant to said statute, the posting of a six thousand dollar bond was set as a pre-condition to pursuing the claim through the usual judicial process. Plaintiff's dismissal for failure to post the requisite bond, as affirmed by the Appeals Court of the Commonwealth of Massachusetts, does not implicate the validity of any statute or treaty of the United States, or involve any title, right, privilege or immunity

claimed under the Constitution of the United States, or draw into question any state statute on the ground of its repugnance to the Constitution, treaties or laws of the United States. The dismissal of Plaintiff/Petitioner's case rested exclusively on state law grounds from which review by the United States Supreme Court, pursuant to 28 U.S.C., §1257(a), would be unwarranted.

ARGUMENT

I. THE DISMISSAL OF THIS CASE PURSUANT TO M.G.L.c. 231, §60B, THE SO-CALLED MEDICAL MALPRACTICE STATUTE, DOES NOT PRESENT AN APPROPRIATE CIRCUMSTANCE FOR THE GRANTING OF PETITIONER'S REQUEST FOR ISSUANCE OF WRIT OF CERTIORARI.

For review by the United States Supreme Court, the state's decision must draw into question a state statute on the ground of its repugnance to the Constitution, treaties or laws of the United States.[1] 28 U.S.C., §1257(a). A State Court decision grounded exclusively on state law, as here, is not ripe for review by the United States Supreme Court.

In the case at bar, Petitioner filed a claim sounding in medical malpractice against the named Defendants. Pursuant to state law, M.G.L.c. 231, §60B, Petitioner was obliged to present an offer of proof to the Medical Malpractice Tribunal which "shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the Plaintiff's case is merely an unfortunate medical result." M.G.L.c. 231, §60B (1st para.)

The statute further provides that "[i]f a finding is made for the defendant . . . the plaintiff may pursue the claim through

[1] The state's decision in question neither implicates the validity of a treaty or state of the United States, nor involves any title, right, privilege of immunity claimed under the Constitution or Statutes of the United States.

the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent." *Id.* (6th para.) In the case of Ms. Barber, the evidence presented to the Tribunal was found insufficient to allow the case to proceed absent the filing of a bond. No bond was posted, and the case was dismissed.

The constitutionality of the statute is not at issue in this petition for Writ of Certiorari.[2] Instead, petitioner focuses on alleged clerical and procedural errors which were raised and disposed of in the state court forum. These matters were addressed and disposed of exclusively on state law grounds, without implication of the Constitution, laws or treatises of the United States. There exist no grounds for review by the United States Supreme Court under 28 U.S.C., §1257. The application of Section 60B to Petitioner's case is more fully developed below.

II. The Medical Malpractice Tribunal Properly Determined That Plaintiff's Offer Of Proof Was Insufficient To Raise A Legitimate Question Of Liability Appropriate For Judicial Inquiry.

At the Tribunal stage, Plaintiff in a medical malpractice action must present evidence that her claim is meritorious, and not merely an "unfortunate medical result." M.G.L.c.231, Section 60B. The major legislative purpose of the tribunal procedure "is to protect the profession as well as the public interest against the often lengthy and costly pretrial and trial proceedings of unfounded negligence claims". *Lubanes* v. *George*, 386 Mass. 320, 325 (1982).

The standard of review in evaluating the tribunal's findings is "whether the material presented and the offer of proof, when presented to a jury, would be enough to defeat a defendant's motion for directed verdict." *Little* v. *Rosenthal*, 376 Mass.

[2] The constitutionality of the screening procedure of M.G.L.c. 231, §60B is discussed in *Paro* v. *Longwood Hospital*, 373 Mass. 645 (1977).

573, 578 (1978). See also, *McMahon* v. *Glixman*, 379 Mass. 60, 66 (1979); *Kilmartin* v. *Lowell General*, 22 Mass.App.Ct. 901 (1986).

The plaintiff must present "evidence" to be "properly substantiated" at trial; mere allegations of expected proof will not suffice. *Gugino* v. *Harvard Community Health Plan*, 380 Mass. 464, 468 (1980). Expert testimony is required to establish negligence in those instances where the allegations are beyond the competence of the lay person. *Ward* v. *Levy*, 21 Mass.App.Ct. 1101 (1989).

In the present case, the Tribunal correctly determined that the Plaintiff's offer of proof concerning the Somerville Hospital and Dr. Fine, as well as the other Defendant, Visiting Nurses, Inc., was insufficient to raise a legitimate question of liability appropriate for further judicial inquiry. There was no expert testimony offered critical of the care rendered. Only a rambling account of events confusedly related to Plaintiff's decedent, Urania Spinos' last hospitalization and ultimate demise were offered. There was no evidence which, if taken to be true, would support a finding of medical negligence on the part of the Somerville Hospital or Dr. Fine. Finally, there was no evidence of a causal relationship between the alleged negligence and the claimed damage. The tribunal voted appropriately against the Plaintiff.

III. Judgment For Defendants Properly Entered On The Basis Of The Medical Malpractice Tribunal's Finding.

M.G.L.c. 231, Section 60B provides that "[i]f a finding is made for the defendant or defendants in the case the plaintiff may pursue to claim through the usual judicial process only upon filing bond in the amount of six thousand dollars. . . ." M.G.L.c. 231, Section 60B. Furthermore, "if said bond is not posted within thirty days of the tribunal's finding *the action shall be dismissed.*" *Id.* (emphasis supplied). Allowance of defendant's motions to dismiss for failure to post the requisite bond was proper, and in accordance with law.

Furthermore, the case in its entirety was properly dismissed on the basis of the Tribunal's finding notwithstanding the varied allegations, and notwithstanding the contention that the Tribunal lacked jurisdiction over what Plaintiff claims are non-medical issues. Plaintiff, herself, indicates that this is a case of malpractice against a provider of health care by invoking M.G.L.c. 231, Section 60C in her Civil Action Cover Sheet. She also alleges in her Complaint that the defendants "failed to perform their duties in general and provide the standard of care expected when a patient is taken to a hospital"; that the hospital was "negligent or failed to use due care in establishing emergency room procedures"; that Dr. Fine "abandoned" his patient; and that all Defendants "failed to adequately and properly treat the plaintiffs' decedent according to their respective professional standards." (Appendix 1-8)

In substance, the claim is one of malpractice. Section 60B is sufficiently flexible to encompass all theories alleged. See *Salem Orthopedics* v. *Quinn*, 377 Mass. 514 (1979) (claim of breach of promise to produce a specific medical result subject to screening provision of M.G.L.c. 231, Section 60B); *Little* v. *Rosenthal*, 376 Mass. 573 (1978) (medical tribunal has jurisdiction to hear unfair trade practice claim); *Johnson* v. *Stein*, 29 Mass.App.Ct. 996 (1990) (allegation of intentional misrepresentation by a health care provider to a patient is a proper subject for medical malpractice tribunal). What is at stake is a malpractice claim. This Court should look to that substance, not the legal theory adopted. *Schenker* v. *Binns*, 18 Mass.App.Ct. 404, 406-407 (1984). It is eminently appropriate in this case to allow the tribunal screening procedure to work as intended.

IV. All Other Issues Raised By Plaintiff In Her Petition Are Moot And/Or Fail To Raise A Question Appropriate For Review On Writ Of Certiorari.

Ms. Barber has raised a myriad of issues in her Petition regarding discovery, default, bias, discrimination and other

issues only loosely identified. Said issues did not delay the affirmance of the Superior Court's actions in this case, and should not be grounds for review by the United States Supreme Court. All such issues were raised and disposed of on exclusively state law grounds. Issuance of a Writ of Certiorari is not warranted in this case.

CONCLUSION

For the reasons and argument stated above, it is respectfully requested by Respondents, Somerville Hospital and Albert H. Fine, M.D., that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Massachusetts General Laws c. 231

§ 60B. Malpractice action against provider of health care; tribunal; composition, etc.; evidence; witnesses; findings; expenses

Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician licensed to practice medicine in the commonwealth under the provisions of section two of chapter one hundred and twelve and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.

Said physician shall be selected by the single justice from a list submitted by the Massachusetts Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve. The list submitted to the single justice shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located. The attorney shall be selected by the single justice from a list submitted by the Massachusetts Bar Association. The attorney and physician shall, subject to appropriation, each be compensated in the amount of fifty dollars.

Where the action of malpractice is brought against a provider of health care not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract oc-

curred, as selected by the superior court justice in a manner he determines fair and equitable.

Where there are codefendants representing more than one field of health care the superior court justice shall determine in his discretion who shall represent the health care field on the tribunal.

Each such action for malpractice shall be heard by said tribunal within fifteen days after the defendant's answer has been filed. Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. Admissible evidence shall include, but not be limited to, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statements of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts without the necessity of such experts appearing at said hearing. The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto. Such a witness shall be allowed traveling expenses and a reasonable fee to be fixed by the tribunal which shall be assessed as costs. The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.

If a finding is made for the defendant or defendants in the case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for costs assessed, including witness and experts fees and attorneys fees if the plain-

tiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof.

For the purposes of this section, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment.

The expenses and compensation of said tribunal shall be paid by the commonwealth, provided, however, that the pro rata percentage of such expenses and compensation engendered by actions brought against providers of health care registered under chapter one hundred and twelve shall not be in excess of the amounts received by the commonwealth for registration fees for such providers of health care under said chapter one hundred and twelve, less the amount expended for expenses and compensation of the respective boards of registration of said providers of health care under said chapter one hundred and twelve.

Whenever the tribunal makes a finding, the clerk of the court shall, no later than fifteen days after such finding, send a copy of the complaint and finding to the board of registration in medicine.

Upon entry of judgment, settlement, or other final disposition at trial court level, the clerk shall, no later than fifteen days after such entry, send a copy of the judgment, settlement or other final disposition, to the board of registration in medicine. The terms of such judgment, settlement, or other final disposition shall not be sealed by agreement of the parties or by any

other means and shall be available for public inspection, except, however, the identity of the plaintiff may be kept confidential by the board.

Amended by St.1985, c. 759, § 3; St.1986, c. 351, §§ 21, 22; St.1988, c. 199, § 41.

§ 60C. Malpractice complaints; ad damnum prohibited

No writ or complaint for malpractice, error or mistake against a provider of health care shall contain an ad damnum or monetary amount claimed against such defendant.

Added by St.1975, c. 362, § 5.